In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1069

ROBERT J. WHITAKER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that there was probable cause to support a warrant for the search only of a balcony on which marijuna plants were seen, and not of the apartment of which the balcony was a part.

After a jury trial in the United States District Court for the District of Columbia, petitioner Robert Whitaker was convicted of possession of marijuana, in violation of 33 D.C. Code 402, and possession of heroin and cocaine with intent to distribute, in violation of 21 U.S.C. 841(a). He was sentenced to five years' probation. At the joint trial, petitioner Jacquelyn Whitaker was convicted of possession of heroin and cocaine, in violation of 33 D.C. Code 402. She was sentenced to two years' probation. The court of appeals affirmed both convictions (Pet. App.).

On August 22, 1973, two District of Columbia police officers observed marijuana plants growing on the balcony of petitioners' apartment (H. Tr. 32-33).[1] The marijuana plants were also observed by police officers on August 23 and 27, 1973 (H. Tr. 33-34).

On August 27, 1973, a search warrant was issued authorizing a search of petitioners' apartment for marijuana and related paraphernalia. The warrant was based on an affidavit detailing the observations of the police officers on August 23 and 27. The affidavit also stated that the supervisor of the apartment building in which petitioners lived had received complaints from a tenant about loud noises and strange odors coming from petitioners' apartment.

The search warrant was executed later that day and twelve marijuana plants were seized from the balcony. Petitioner Jacquelyn Whitaker who was at the apartment at this time was arrested and was advised of her rights (Tr. 12-13). When asked if her husband was present and if any other narcotics were in the apartment, she stated that he was not at home and asked the officers to wait until he returned to conduct a search (Tr. 13). She telephoned her husband, and he arrived approximately one-half hour later (Tr. 14, 29). When petitioner Robert Whitaker arrived he was advised of his rights and was told that marijuana had been found. When asked whether there were weapons or other drugs on the premises, he showed an officer a revolver that was in the bedroom (Tr. 15-16). There the officer opened a plastic bag on the floor containing narcotics paraphernalia which was seized (Tr. 16, 30). He then found a pill bottle

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[1] "H. Tr." refers to the one-volume transcript of the suppression hearing. "Tr." refers to the one-volume transcript of the trial.

containing heroin and cocaine in a refrigerator in the kitchen (Tr. 16-17, 37-38). These items and almost $1,400 in cash were seized (Tr. 17). The quality of the heroin, the quantity of the diluting materials, and the narcotics paraphernalia seized indicated that the possessor of those items was a distributor (Tr. 49-50).

Petitioners contend that the presence of the marijuana plants on the balcony of their apartment provided probable cause only to search the balcony and seize the plants. They therefore claim that the warrant authorizing a search of their apartment must have been based only on the fact that loud noises and strange odors emanated from their apartment. This, they claim, does not provide probable cause.

The flaw in this argument was pointed out in the following portion of the opinion of the court of appeals, upon which we rely (Pet. App. 5-6):

> Lastly, there is the question of whether in this case probable cause existed for a search as broad as the one that took place. In their argument that it did not, appellants assume that such probable cause must be based on the hearsay evidence of the strange noises and smells given off by their apartment. They urge a lack of proper substantiation before the warrant issuer of these reports, and also the inadequacy of such information, even assuming its truth, to create probable cause to believe that narcotics would be found. The warrant does not appear, however, to require any support from the noise and smell reports. The police officers' careful and repeated observations of the rather large amount of marijuana growing on the balcony appear in themselves to establish probable cause to believe that narcotics were kept in the apartment that would only be un-

covered by a thorough search. Appellants' position appears to be that the observations could justify a search only of the balcony, or only for living marijuana plants, which of course would not be found in a refrigerator vegetable bin or plastic shopping bag. But the presence of some narcotics strongly suggests the presence of more; and even if the presence of cocaine and heroin were not indicated, there was at least probable cause to suspect that the apartment contained marijuana reduced to some easily secreted form.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.